STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED September 22, 2000
v	No. 220818 Kent Circuit Court
EVERETTE MOSHI TAYLOR, Defendant-Appellant.	LC No. 98-004729-FH

Before: Smolenski, P.J., and Zahra and Collins, JJ.

PER CURIAM.

Defendant was convicted by a jury of possession with intent to deliver 50 grams or more but less than 225 grams of cocaine, MCL 333.7401(2)(a)(iii); MSA 14.15(7401)(2)(a)(iii), and possession with intent to deliver less than five kilograms of marijuana, MCL 333.7401(2)(d)(iii); MSA 14.15(7401)(2)(d)(iii). He was sentenced as a second habitual offender, MCL 769.10; MSA 28.1082, to twenty to forty years' imprisonment for the cocaine conviction and four to eight years' imprisonment for the marijuana conviction. He appeals as of right. We affirm defendant's convictions and sentences, but remand for an articulation of the reasons for imposing the given sentences.

Defendant first argues that the search warrant that led to the discovery of the incriminating evidence in this case was invalid because the affidavit used to secure the search warrant was faulty. We disagree.

Defendant was identified by an eyewitness as the person who shot and killed Elijah McGee, on February 12, 1998. On March 5, 1998, defendant was arrested and an affidavit was prepared to obtain a warrant to search defendant's residence and any vehicles found on the property in order to look for the murder weapon, ammunition, documents showing ownership of weapons or documents establishing that defendant lived at the address where the search warrant was to be executed. The affidavit at issue identified the affiant as a police officer assigned to the Major Case Team. It further established the bases for concluding that defendant participated in the murder and offered substantial information to connect defendant to the address that the police wished to search. The affiant further relied on his experience to connect the search of the address with the murder and murder weapon. In this respect, the affiant averred:

> Your affiant have [sic] been a police officer for 22 years and a detective for 13 years. This experience has taught your affiant that firearms, even those firearms used in illegal activities, are often retained by those individuals involved in said illegal activities.

The reviewing magistrate found probable cause to issue the search warrant.

During the execution of the search warrant, the police found large quantities of marijuana and cocaine in a car outside the residence, which car was believed to be owned and possessed by defendant. Inside the residence, in an upstairs bedroom, the police also found marijuana, marijuana seeds, tiny plastic baggies, large sums of hidden cash, a pager, an electronic organizer, and documents and identification belonging to defendant.

Defendant moved to suppress the evidence, arguing that the affidavit used to obtain the search warrant merely provided one conclusory statement regarding the affiant's experience, which was insufficient to establish probable cause. The trial court disagreed. We review the trial court's findings of fact regarding the motion to suppress for clear error. *People v Echavarria*, 233 Mich App 356, 366; 592 NW2d 737 (1999). The trial court's ultimate decision regarding the motion to suppress is reviewed de novo. *Id.*[1]

> In reviewing a magistrate's decision to issue a search warrant, this Court must evaluate the search warrant and underlying affidavit in a common-sense and realistic manner. This Court must then determine whether a reasonably cautious person could have concluded, under the totality of the circumstances, that there was a substantial basis for the magistrate's finding of probable cause. Probable cause for a search exists where a person of reasonable caution would conclude that contraband or evidence of criminal conduct will be found in the place to be searched. [*People v Darwich*, 226 Mich App 635, 636-637; 575 NW2d 44 (1997) (citations omitted).]

Contrary to defendant's argument, an affiant may rely on his experience to establish probable cause that an item sought to be found will be in the place searched. *Darwich, supra* at 638-639. In *Darwich*, the affidavit stated that the defendant was involved in the distribution of marijuana at his place of business. *Id.* at 637. The affidavit relied on the experience of the affiant to connect that criminal activity to defendant's residence. *Id.* at 638. This Court held that the magistrate who considered the

[1] In the present case, the trial court did not make findings of fact on the record regarding defendant's motion to suppress. Defendant apparently made the same motion challenging the search warrant in his murder case. The trial court issued findings of fact and denied that motion. In this case, the trial court adopted its previous findings when denying the motion to suppress. Defendant has not provided those findings to this Court. Thus, our review of the trial court's factual findings is precluded. Nevertheless, we review the trial court's ultimate ruling de novo and conclude that the trial court correctly denied the motion to suppress.

affidavit could rely on the affiant's statement regarding his experience to support a finding of probable cause, stating:

> The magistrate is not required to accept blindly an affiant's statements. Rather, the magistrate's duty is to examine the affiant's reliance on the affiant's experience in the same way the magistrate examines other facts and circumstances presented in the affidavit and decide whether, when read in a common-sense and realistic manner, they together establish probable cause. Thus, we find that an affiant's representations in a search warrant affidavit that are based upon the affiant's experience can be considered along with all the other facts and circumstances presented to the examining magistrate in determining probable cause. [*Id.* at 639.]
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> [I]n the instant case, the affidavit stated that no significant quantity of marijuana was found at defendant's store. The affiant stated that his experience led him to believe that it is common for drug dealers to package and store narcotics at one location and distribute them at another. These statements, together with the statements implicating defendant in the selling of narcotics, lead to a logical inference that defendant stored elsewhere the materials used in the operation. Defendant's residence was a logical place to look for the source of the marijuana packets sold at defendant's store. Accordingly, the issuing magistrate was justified in finding probable cause to search defendant's residence in the instant case, and the trial court improperly granted defendant's motion to suppress the evidence obtained pursuant to that warrant. [*Id.* at 640.]

In this case, the affidavit set forth facts that implicated defendant in a murder. The affiant stated that his experience led him to believe that firearms, even those used in illegal activities, are often retained by perpetrators. The statements in the affidavit lead to a logical inference that defendant may have retained the weapon that was used in the murder. The weapon was not found in defendant's possession at the time of his arrest. The logical place to look for it was defendant's residence or automobile. Defendant's argument that an affiant's experience is insufficient to establish probable cause is without merit in light of *Darwich, supra.*[2]

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[2] We note that defendant misstates the holding in *People v Russo*, 439 Mich 584; 487 NW2d 698 (1992). *Russo* does not stand for the proposition that it is reasonable to infer that a criminal defendant would get rid of a gun after using it, contrary to the statement of the affiant in the present case. In *Russo*, the Court recognized that a criminal would be likely to get rid of evidence that was "unwittingly" or "incidentally" created during the commission of a crime. *Id.* at 612. It did not indicate that a defendant would get rid of a gun after using it in the commission of a crime. The case at hand is not a case where the police were looking for evidence that may have been unwittingly or incidentally created during the shooting of McGee. Rather, they were looking for the gun that defendant was seen using when he shot McGee.

Furthermore, the three week time period between the murder and the issuance of the search warrant does not undermine the validity of the warrant. The passing of time is but one factor in the determination of probable cause and must be weighed and balanced in light of all of the facts asserted by the affiant. *People v Russo*, 439 Mich 584, 605-606; 487 NW2d 698 (1992). Here, the time factor was duly noted by the affiant and considered by the magistrate. The passage of time did not negate the existence of probable cause.

Defendant also argues that some of the evidence seized, which was not listed in the search warrant, was improperly seized and used against him. Specifically, he argues that large sums of money and the small, plastic baggies were not "obviously incriminating" and thus, the officers had no probable cause to seize them. This issue is not preserved because it was not raised at any time prior to this appeal. Regardless, we find that it is without merit. When a police officer is lawfully in a position from which he can view items and their incriminating character is "immediately apparent," he may seize the items without a warrant. *People v Champion*, 452 Mich 92, 101, 104; 549 NW2d 849 (1996) (discussing the "plain view doctrine" in connection with the Court's adoption of the "plain feel exception" to the warrant requirement); *People v Moore (On Remand)*, 186 Mich App 551, 554; 465 NW2d 573 (1990). The use of the phrase "immediately apparent" in this context is synonymous with the term "probable cause." *Champion*, *supra* at 108. Thus, if an officer has probable cause to believe that an item is contraband, he may seize it if he lawfully comes into contact with it. When determining whether there is probable cause, it is necessary to review the totality of the circumstances. *Id.* at 110-112. An officer may deliberate before determining that there is probable cause that an item is contraband. *Id.* at 108, citing *State v Jones*, 103 Md App 548, 565-566; 653 A2d 1040 (1995). A law enforcement officer may form a hypothesis, weigh the possibilities and probabilities, and conclude that there is probable cause to believe that an item is connected with criminal activity. *Id.*, citing *Jones*, *supra*. An officer's conclusion may be supported by his knowledge of criminal activity in general. *Id.* at 109, citing *State v Buchanan*, 178 Wis 2d 441, 450; 504 NW2d 400 (1993).

Here, there is no question that the officers had probable cause to believe that the cash, plastic baggies, pager, and electronic organizer, which were legitimately found during a valid search, were contraband. Officers found a substantial quantity of drugs in a car that was known to belong to defendant. Moreover, additional drugs, the large sums of money, and the plastic baggies were found in a bedroom, which appeared to belong to defendant. The money was found hidden in unusual ways. There was a close proximity between the large amounts of drugs and large amounts of cash and the unusual baggies. The experience of the officers and information found in the bedroom led to the conclusion that the drugs, cash, pager, organizer and baggies belonged to defendant and were most likely related to criminal drug transactions. Looking at the totality of the circumstances, the incriminating character of the non-drug items, and specifically the cash and baggies, was "immediately apparent." Thus, seizure of those items was proper.

Defendant also raises several issues relating to sentencing. First, he argues that he should be resentenced because the trial court doubled the authorized sentences for his crimes pursuant to MCL 333.7413(2); MSA 14.15(7413)(2). Defendant does not contest that doubling the authorized sentences is unlawful, but rather, argues that the trial court believed that it was required to double the

sentences and that, because it was unaware that it had discretion when sentencing, resentencing is required. We disagree. The law is settled that if there is "no clear evidence that the sentencing court believed that it lacked discretion, the presumption that a trial court knows the law must prevail." *People v Alexander*, 234 Mich App 665, 675; 599 NW2d 749 (1999), citing *People v Garfield*, 166 Mich App 66, 79; 420 NW2d 124 (1988). Here, there is no indication that the trial court believed it lacked discretion. To the contrary, it appears that the trial court realized it had discretion. When imposing the sentence, it noted that the sentencing guidelines were inapplicable for habitual offenders. In addition, MCL 333.7413(2); MSA 14.15(7413)(2) is clear that the increasing or doubling of the authorized time of imprisonment for second or subsequent offenders is discretionary. Because there is no clear evidence that the trial court was unaware of its discretion and because the trial court is presumed to know the law, resentencing is not required in this case.

Second, defendant argues that the trial court erred when it failed to articulate the reasons for the sentences imposed. When a trial court fails to articulate the reasons for imposing a sentence, the case must be remanded for the trial judge to supply his reasoning. *People v Triplett*, 432 Mich 568, 573; 442 NW2d 622 (1989). However, resentencing is not the appropriate remedy. *Id.*; *People v White*, 208 Mich App 126, 136; 527 NW2d 34 (1994). The prosecution concedes that the trial court failed to explain the sentences in the present case. Consequently, we remand this case so that the trial judge may articulate his reasons for imposing the sentences.[3]

Third, defendant argues that his sentences are disproportionate. We disagree. The sentences are proportionate to the seriousness of the offenses and the offender. *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990). The evidence used to convict defendant was seized when defendant was under investigation for a murder that occurred when a drug sale he was engaged in went awry. At the time the search warrant was executed, a substantial quantity of drugs were found. The cocaine that was found was pure and was not street ready. It had an estimated value of $14,000. In addition, a large amount of marijuana and some marijuana seeds were found. Defendant also had approximately $13,000 in cash stashed in various hiding places throughout his bedroom. The circumstances of the crime suggest that defendant was a serious drug dealer, who possessed a large quantity of drugs for resale and dealt with large amounts of money. Defendant's criminal background was also sufficiently extensive to justify the sentences given. He had been convicted of second-degree murder and felony-firearm stemming from the aforementioned murder. He also had numerous misdemeanor convictions, including several drug related convictions. Accordingly, the trial court did not abuse its discretion when imposing the sentence.

Affirmed, but remanded for an explanation of defendant's sentences. We do not retain jurisdiction.

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[3] The trial judge in this case, the Honorable Robert Bensen, has retired since presiding over this matter. However, we do not believe that Judge Bensen's retirement will pose an obstacle to supplementing the sentencing record. We note that Judge Bensen, by assignment of the State Court Administrator's Office, regularly presides over matters in the Kent County Circuit Court.

/s/ Michael R. Smolenski
/s/ Brian K. Zahra
/s/ Jeffrey G. Collins